

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

ANTHONY CRESPO, JR.,

Petitioner,

No. CIV S 04-0404 DFL KJM P

vs.

KATHY MENDOZA-POWERS  
(Warden),

FINDINGS AND RECOMMENDATIONS

Respondent.

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Petitioner is a state prisoner proceeding pro se with an application for writ of habeas corpus under 28 U.S.C. §2254. Petitioner was convicted by a jury in the Superior Court of Sacramento County for the sale and transportation of methamphetamine. He was sentenced to thirteen years in state prison. In this court, the petitioner raises the following challenges: (1) that his counsel was improperly changed without his consent (Claim 1), (2) that he was denied effective assistance of counsel (Claim 2), (3) that the trial court committed instructional error (Claim 3), and (4) that the prosecutor committed misconduct (Claim 4). Respondent denies these allegations and denies that petitioner is entitled to relief.

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1 I. Background

2 Following sentencing, petitioner appealed his conviction to the California Court  
3 of Appeal, Third Appellate District, claiming instructional error and prosecutorial misconduct  
4 (Claims 3 and 4 herein). The court of appeal's summary of the facts developed at trial is  
5 consistent with this court's reading of the record:

6 About 11:35 p.m. on April 20, 2000, Sacramento Police Officer  
7 John Banks stopped a car with expired registration tags. Defendant  
8 was driving and no one else was in the car. The officer confirmed  
9 with the Department of Motor Vehicles that the registration was  
10 expired and that defendant's driver's license was suspended. The  
11 car was impounded. An inventory search revealed thirteen \$20 bills  
12 rolled up and in the driver's door handgrip used to close the door.  
On the floor between the driver's seat and console, an officer found  
a brown paper bag containing two baggies with a total of 6.44  
grams of methamphetamine and a digital gram scale in a pouch. A  
buck knife was found under the bag. Defendant was arrested and  
booked. A search of defendant's person revealed a pager and an  
address book.

13 Prints lifted from the brown paper bag, baggies and scale did not  
14 match the fingerprints of either defendant or Douglas Hernandez,  
the owner of the car.

15 At trial, an expert witness opined that the methamphetamine was  
16 possessed for sale based on the number of \$20 bills, the weight of  
the methamphetamine possessed (two "eight balls"), the pager  
17 which provided a means for users to contact the dealer, the scale to  
measure the methamphetamine sold and the lack of paraphernalia.  
The expert believed that less than five percent of users possess two  
18 "eight balls" for personal use. The lack of a cellular phone did not  
change the expert's opinion that the methamphetamine was  
19 possessed for sale.

20 Defendant did not testify.

21 Hernandez testified for the defense. He knows defendant through  
22 defendant's sister. Hernandez considers defendant a friend but  
denied that he would lie for defendant. On April 20, 2000,  
23 Hernandez loaned his car to defendant. When he did so, he  
knowingly left inside seven grams of methamphetamine for his  
24 personal use, a buck knife, a scale, and \$260 in the armrest of the  
driver's door. Hernandez admitted having been arrested for a  
drug-related offense. Hernandez never got his car back because he  
25 did not have enough money to get it out of impound. He was aware  
he could be arrested for admitting the methamphetamine was his.

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1 On cross-examination, Hernandez admitted having known  
2 defendant for seven years having dated and lived with defendant's  
3 sister for about that period of time. Hernandez had a child with  
4 defendant's sister. He had borrowed \$260 from defendant's sister  
5 the day of defendant's arrest to pay for a smog inspection for the  
6 car in order to register it. He obtained neither the inspection nor  
7 registration that day. He drove the car two or three times a week  
8 but had not driven it for a week prior to putting the items in the car.  
9 Hernandez did not trust people and would never leave his jewelry  
10 in the car. On the day of defendant's arrest, Hernandez loaned his  
11 car to defendant who needed a ride. Hernandez had never before  
12 loaned his car to defendant. Hernandez claimed he forgot about the  
13 items in the car. He then stated that he knew the items were in the  
14 car but did not tell defendant because he left too fast.

15 Hernandez had spoken with defendant only a couple of times since  
16 defendant's arrest and had visited defendant at the jail once. After  
17 defendant told Hernandez what happened, Hernandez claimed he  
18 would tell the authorities that the methamphetamine was his.  
19 Hernandez never did. Defendant asked Hernandez one time if  
20 Hernandez was going to follow through. Hernandez told defendant  
that he had made an appointment but failed to show.

21 Hernandez initially refused to identify the supplier of the  
22 methamphetamine found in the car. When the prosecutor moved to  
23 strike Hernandez's testimony, Hernandez claimed his supplier was  
24 "George" but did not know his last name or phone number. Two  
25 days before defendant's arrest, Hernandez claimed he met George  
26 playing pool at a bar called Yolanda's. After playing for a couple of  
hours, George asked Hernandez if he knew whether "anybody  
[was] looking for anything." Hernandez bought seven grams of  
methamphetamine, in one package, for \$150. Hernandez used his  
scale to measure it and later divided it, not to sell, but to smoke. He  
last saw his purchase on the 18th when he bought it from George.  
Hernandez did not use any on the 18th, 19th or 20th. Although he  
usually kept methamphetamine in his pocket, he put it in his car.  
He usually kept his pipe in his pocket or hidden in the house. He  
could not explain why he did not keep the methamphetamine at the  
house.

27 Hernandez claimed he smoked about an eight ball every other day.  
28 He said that he smoked a \$20 bag at a time. He initially refused to  
29 identify his previous supplier (before "George" from whom he  
30 purchased methamphetamine only once). The court ordered  
31 Hernandez to answer or his entire testimony would be stricken.  
32 Hernandez claimed, "I didn't say I used before that." He then  
33 admitted having used every other day and his supplier was "David  
34 Speed" but Hernandez did not have an address or phone number.  
At first he claimed he had other suppliers but then quickly retracted  
that statement and claimed only Speed had been his supplier.

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Hernandez claimed he no longer used, the last time being in July when he bought about a quarter ounce. He used to buy on a weekly basis. He had to borrow money to smog and register his car because he spent all his money on methamphetamine.

Hernandez admitted an arrest for drug paraphernalia in July 2000. He knew he could be arrested for claiming the methamphetamine in the car was his. He claimed no one had threatened or asked him to testify. Hernandez admitted that the consequences of admitting the offense were "much greater for the defendant" than for him but that did not influence his testimony. He admitted failing to meet with district attorney investigators despite having had two appointments. He finally met with an investigator the week before trial.

Answer, Ex. D (Court of Appeal Opinion) at 2-6.

The Court of Appeal affirmed petitioner's conviction. Petitioner sought review of the Court of Appeal's decision in the California Supreme Court. That request was denied. Following direct appeal, petitioner filed requests for collateral relief on his claims for substitution of counsel without consent and ineffective assistance of counsel (Claims 1 and 2 herein) at all three levels of the California courts. All of those requests were denied.

## II. Standards for Granting Habeas Relief

An application for a writ of habeas corpus by a person in custody under a judgment of a state court can be granted only for violations of the Constitution or laws of the United States. 28 U.S.C. § 2254(a). Federal habeas corpus relief also is not available for any claim decided on the merits in state court proceedings unless the state court's adjudication of the claim:

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d) (referenced herein in as "§ 2254(d)" or "AEDPA"). See Ramirez v. Castro, 365 F.3d 755, 773-75 (9th Cir. 2004) (Ninth Circuit affirmed lower court's grant of habeas relief

1 under 28 U.S.C. § 2254 after determining that petitioner was in custody in violation of his Eighth  
2 Amendment rights and that § 2254(d) does not preclude relief); see also Lockyer v. Andrade, 538  
3 U.S. 63, 70-71 (2003) (Supreme Court found relief precluded under § 2254(d) and therefore did  
4 not address the merits of petitioner's Eighth Amendment claim).<sup>1</sup> Courts are not required to  
5 address the merits of a particular claim, but may simply deny a habeas application on the ground  
6 that relief is precluded by 28 U.S.C. § 2254(d). Lockyer, 538 U.S. at 71 (overruling Van Tran v.  
7 Lindsey, 212 F.3d 1143, 1154-55 (9th Cir. 2000) in which the Ninth Circuit required district  
8 courts to review state court decisions for error before determining whether relief is precluded by  
9 § 2254(d)). It is the habeas petitioner's burden to show he is not precluded from obtaining relief  
10 by § 2254(d). See Woodford v. Visciotti, 537 U.S. 19, 25 (2002).

11 The "contrary to" and "unreasonable application" clauses of § 2254(d)(1) are  
12 different. As the Supreme Court has explained:

13 A federal habeas court may issue the writ under the "contrary to"  
14 clause if the state court applies a rule different from the governing  
15 law set forth in our cases, or if it decides a case differently than we  
16 have done on a set of materially indistinguishable facts. The court  
17 may grant relief under the "unreasonable application" clause if the  
18 state court correctly identifies the governing legal principle from  
19 our decisions but unreasonably applies it to the facts of the  
20 particular case. The focus of the latter inquiry is on whether the  
21 state court's application of clearly established federal law is  
22 objectively unreasonable, and we stressed in Williams [v. Taylor,  
23 529 U.S. 362 (2000)] that an unreasonable application is different  
24 from an incorrect one.

25 Bell v. Cone, 535 U.S. 685, 694 (2002). A state court does not apply a rule different from the  
26 law set forth in Supreme Court cases, or unreasonably apply such law, if the state court simply

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27 <sup>1</sup> In Bell v. Jarvis, 236 F.3d 149, 162 (4th Cir. 2000), the Fourth Circuit Court of Appeals  
28 held in a § 2254 action that "any independent opinions we offer on the merits of constitutional  
claims will have no determinative effect in the case before us . . . At best, it is constitutional  
dicta." However, to the extent Bell stands for the proposition that a § 2254 petitioner may obtain  
relief simply by showing that § 2254(d) does not preclude his claim, this court disagrees. Title  
28 U.S.C. § 2254(a) still requires that a habeas petitioner show that he is in custody in violation  
of the Constitution before he or she may obtain habeas relief. See Lockyer, 538 U.S. at 70-71;  
Ramirez, 365 F.3d at 773-75.

1 fails to cite or fails to indicate an awareness of federal law. Early v. Packer, 537 U.S. 3, 8  
2 (2002).

3 The court will look to the last reasoned state court decision in determining  
4 whether the law applied to a particular claim by the state courts was contrary to the law set forth  
5 in the cases of the United States Supreme Court or whether an unreasonable application of such  
6 law has occurred. Avila v. Galaza, 297 F.3d 911, 918 (9th Cir. 2002), cert. dismissed, 538 U.S.  
7 919 (2003). Where the state court fails to give any reasoning whatsoever in support of the denial  
8 of a claim arising under Constitutional or federal law, the Ninth Circuit has held that this court  
9 must perform an independent review of the record to ascertain whether the state court decision  
10 was objectively unreasonable. Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003). In other  
11 words, the court assumes the state court applied the correct law, and analyzes whether the  
12 decision of the state court was based on an objectively unreasonable application of that law.

13 It is appropriate to look to lower federal court decisions to determine what law has  
14 been "clearly established" by the Supreme Court and the reasonableness of a particular  
15 application of that law. See Duhaime v. Ducharme, 200 F.3d 597, 598 (9th Cir. 1999).

16 III. Arguments and Analysis

17 A. Change of Appointed Counsel Without Petitioner's Consent (Claim 1)

18 Petitioner contends that his assigned counsel was changed from an unknown  
19 public defender to Assistant Public Defender Joseph Cress without his consent. This claim was  
20 presented via a petition for writ of habeas corpus to all three levels of the California state courts.  
21 In denying the claim, the Sacramento County Superior Court found:

22 Petitioner . . . attaches no reasonably available documentary  
23 evidence to support his claim (Harris, supra)<sup>2</sup>. Indeed, the minute  
24 orders do not indicate that anyone other than the public defender's  
office had ever been appointed to represent petitioner. Joseph  
Cress was an assistant public defender, who appears to have been

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26 <sup>2</sup> In re Harris, 5 Cal. 4th 813, 827 n.5 (1993) (requiring that claims be supported by  
reasonably available documentary evidence or affidavits).

1 early assigned to the case. The minute order for May 24, 2000  
2 indicates that assistant public defendant A. Rogers made an  
3 appearance on Mr. Cress's behalf, to request a continuance, while  
4 Mr. Cress was in trial. However, no other minute order indicates  
5 that anyone other than Mr. Cress was counsel of record for the  
case. The claim, therefore, fails under Swain<sup>3</sup> and Harris, supra.

5 Answer, Ex. H (Order denying petition for writ of habeas corpus) at 3.

6 The "supporting facts" provided by petitioner in each petition to the California  
7 courts were as follows: "At some point between the S.C.R. proceedings and preliminary hearing  
8 original counsel was subbed out for counsel Joseph Cress this was done without petitioner's  
9 consent or waiver or showing of good cause." Id., Ex. G at 5, Ex. I at 5 & Ex. K at 5. Petitioner  
10 submitted no documentary evidence to any California court in support of this claim.<sup>4</sup>

11 Respondent does not claim there is a procedural bar to this court's consideration  
12 of this claim due to failure to exhaust state remedies. However, the Ninth Circuit has interpreted  
13 a Swain citation to mean a defendant has failed to exhaust state remedies because the defendant  
14 is being given an opportunity to amend his pleadings to plead facts with specific particularity.  
15 King v. Roe, 340 F.3d 821, 823 (9th Cir. 2003). A citation to Harris would likewise indicate a  
16 failure to exhaust state remedies because the defendant is being given the opportunity to present  
17 reasonably available documentary evidence or affidavits in support of his claim. Although  
18 respondent has not addressed the impact of the Swain/Harris citation on the posture of this case,  
19 this court can no longer find that respondent has waived exhaustion based on litigation conduct.

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21 <sup>3</sup> In re Swain, 34 Cal. 2d 300 (1949) (requiring petitioner to state with particularity the  
22 facts upon which he is relying to justify relief).

23 <sup>4</sup> In support of his claim for ineffective assistance of counsel in his petition to the  
superior court, petitioner attached as Exhibit "A" requests he made for copies of the court minute  
24 orders and hearing transcripts, which were denied. See Answer, Ex. G. In his petitions to the  
California Court of Appeal and Supreme Court, petitioner appends to Exhibit "A" (also in  
25 support of his ineffective assistance of counsel claim) the court minute orders from the Clerk's  
Transcript on Appeal. Id., Exs. I & K. Thus, petitioner appears to have cured this defect with  
26 respect to his ineffective assistance of counsel claim, but not with respect to his claim of  
improper substitution of counsel.

1     Banks v. Dretke, 540 U.S. 668, 674 (2004); 28 U.S.C. § 2254(b)(3). Nevertheless, the court may  
2 address petitioner's claims "when it is perfectly clear that the petitioner has no chance of  
3 obtaining relief." Cassett v. Stewart, 406 F.3d 614, 624 (9th Cir. 2005), cert. denied, \_\_\_\_ U.S.  
4 \_\_\_\_\_, 126 S.Ct. 1336 (2006). Having considered the petition and its exhibits, the answer, reply  
5 and state court record, the court finds the Cassett standard has been satisfied, and thus addresses  
6 this claim below.

7                 While petitioner fails to directly state the basis for his claim in the petition to this  
8 court, in his state court petitions he alleges the substitution of counsel constituted "denial of due  
9 process in violation of Amendments VI and XIV to the Constitution," and the superior court  
10 interpreted it as such in its ruling. Accordingly, this claim is properly interpreted as intending to  
11 state a claim for violation of the Sixth Amendment right to counsel and due process under the  
12 federal Constitution.

13                 The superior court correctly found that petitioner's claim was not supported by the  
14 facts. The minute orders indicate the Public Defender's office was appointed on April 25, 2000.  
15 Clerk's Transcript (CT) 1. It is unclear from the minutes when Assistant Public Defender Joseph  
16 Cress first appeared, although this seems to have been early in the proceedings. After his  
17 appointment, Mr. Cress acted as attorney of record throughout the case. CT 1-5. Another public  
18 defender may have appeared for petitioner during the early stages of the proceedings, and the  
19 minute orders do reflect that a public defender named "A. Rogers" appeared on behalf of Mr.  
20 Cress on May 24, 2000, for the limited purpose of obtaining a continuance because Mr. Cress  
21 was in trial. CT 2. These appearances do not, however, constitute a substitution, improper or  
22 otherwise. Petitioner admits that both of the attorneys appearing in his case were from the public  
23 defender's office. He makes no contention that anyone other than a public defender appeared on  
24 his behalf or consulted with him about his case. Thus, petitioner's claim of substitution of  
25 counsel without his consent is not supported by the facts.

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Even if petitioner could establish counsel was substituted, he has not shown that he had a right to consent to (and presumably refuse) any substitution. Petitioner does not allege that he was denied counsel or the right to represent himself.<sup>5</sup> Petitioner was not entitled to appointment of counsel of his choice. See Morris v. Slappy, 461 U.S. 1, 13-16 (1983); United States v. Mack, 362 F.3d 597, 599 n.3 (9th Cir. 2004). It follows that petitioner's consent was not required for any substitution of counsel, if one was in fact made. Accordingly, petitioner fails to state a claim for habeas relief.

Based upon the foregoing, the state court's denial of petitioner's claim was neither contrary to nor an unreasonable application of clearly established United States Supreme Court precedent. 28 U.S.C. § 2254(d)(1). Petitioner is not entitled to habeas relief on this claim.

#### B. Denial of Effective Assistance of Counsel (Claim 2)

##### 1. Legal Standards

The Sixth Amendment guarantees the effective assistance of counsel. In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court sets forth a two-part test for demonstrating ineffective assistance of counsel. To support a claim of ineffective assistance of counsel, a petitioner must first show that, considering all the

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<sup>5</sup> In his traverse, petitioner notes in support of his claim for ineffective assistance of counsel that the trial court convinced him not to pursue a request to have Cress relieved of his duties. Traverse at 3. This appears to refer to petitioner's request for a continuance on July 27, 2000. When the trial court denied the request, petitioner indicated he wanted to make a "Marsden"[sic] motion and asked to represent himself in place of Mr. Cress. In response, the court indicated that the matter would be sent out for trial that day and that any request by petitioner for a continuance due to petitioner's self-representation would be denied as a delaying tactic. In light of this, petitioner withdrew his request, stating that he had "full confidence" in Mr. Cress. Augmented Reporter's Transcript (ART) 3-7. Petitioner raised a due process claim related to this hearing in his state court petitions. Answer, Exs. G at 6, I at 6 & K at 6. In the last reasoned decision on the claim, the superior court considered and denied the claim on the merits and on procedural grounds. Answer, Ex. H at 3-4. To the extent this reference constitutes a separate claim for relief in this court, petitioner has not exhausted his state court remedies. Pappageorge v. Sumner, 688 F.2d 1294 (9th Cir. 1982). Furthermore, petitioner did not raise this claim in this court, if at all, until his traverse. A ground for relief is not properly raised in a traverse. Cacoperdo v. Demosthenes, 37 F.3d 504, 508 (9th Cir. 1994). Accordingly, this court interprets this reference as support for petitioner's ineffective assistance of counsel claim only.

1 circumstances, counsel's performance fell below an objective standard of reasonableness. See  
2 Strickland at 687-88. After a petitioner identifies the acts or omissions he alleges are not the  
3 result of reasonable professional judgment, the court must determine whether, in light of all the  
4 circumstances, the identified acts or omissions were outside the wide range of professionally  
5 competent assistance. Id. at 690.

6 Second, a petitioner has the burden of establishing that he was prejudiced by  
7 counsel's deficient performance. Strickland at 693-94. Prejudice is found where "there is a  
8 reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding  
9 would have been different." Id. at 694. A reasonable probability is "a probability sufficient to  
10 undermine confidence in the outcome." Id. A reviewing court "need not determine whether  
11 counsel's performance was deficient before examining the prejudice suffered by the defendant as  
12 a result of the alleged deficiencies . . . . If it is easier to dispose of an ineffectiveness claim on the  
13 ground of lack of sufficient prejudice . . . that course should be followed. Pizzuto v. Arave, 280  
14 F.3d 949, 955 (9th Cir. 2002) (quoting Strickland, 466 U.S. at 697),<sup>6</sup> cert. denied, \_\_\_ U.S. \_\_\_,  
15 126 S. Ct. 546 (2005).

16 In assessing an ineffective assistance of counsel claim, judicial scrutiny must be  
17 "highly deferential." Strickland at 689. "It is all too easy for a defendant to second-guess  
18 counsel's assistance after conviction or adverse sentence, and it is all too easy for a court,  
19 examining counsel's defense after it has been proved unsuccessful, to conclude that a particular  
20 act or omission by counsel was unreasonable. Id. Because of this, "[t]here is a strong  
21 presumption that counsel's performance falls within the 'wide range of professional assistance.'"  
22 Kimmelman v. Morrison, 477 U.S. 365, 381 (1986) (quoting Strickland at 689).

23 A habeas petitioner bears the burden of showing that he did not receive effective  
24 assistance of counsel. Saunders v. Eyman, 600 F.2d 728, 729 (9th Cir. 1977).

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26 <sup>6</sup> The original dissent in Pizzuto has been amended and superseded. See Pizzuto v. Arave, 385 F.3d 1247 (9th Cir. 2004).

1           2. Petitioner's Claims

2           Petitioner claims that his trial counsel rendered ineffective assistance by

3           (1) failing to be present at all court proceedings and failing to perform his duties to explain the  
4           proceedings to petitioner; (2) failing to inform him of an unreported chambers meeting during  
5           which counsel agreed that the district attorney would be allowed to question defense witness  
6           Hernandez concerning whether he knew that the consequences for a conviction for possession of  
7           methamphetamine for sale were greater for petitioner than for Hernandez; (3) failing to inform  
8           him of all plea offers; and (4) failing to advise him that taking a plea rather than going to trial  
9           would be a prudent choice. Petition, Attachment ("Ground 2").<sup>7</sup>

10          Petitioner raised all but one of these claims for the first time in his petition for  
11         writ of habeas corpus filed in the Sacramento Superior Court,<sup>8</sup> which denied them for the  
12         following stated reasons:

13          Petitioner first claims that his trial counsel rendered him ineffective  
14         assistance, in failing to properly advise him of the court  
               proceedings and the plea bargains offered by the district attorney.

15          Specifically, petitioner claims that at a first meeting, at the S.C. R.  
16         conference, he was offered 32 months in a bargain but was advised  
17         by his counsel, who was not yet Joseph Cress, then not to accept  
               the offer. He claims that counsel at the time did not inform him of  
               the possible consequences by not accepting the offer, nor of the 15-  
               year maximum sentence he faced.

18          The reporter's transcript for the judgment and sentencing hearing  
19         held on September 21, 2000 before Judge Shepard does contain a  
20         reference by defense counsel Joseph Cress to an offer for 32  
               months that was made at the S.C.R. conference. Petitioner,  
               however, firmly stated at the judgment and sentencing hearing that

22          <sup>7</sup> For ease of analysis, these claims are presented here in an order different from that of  
23         the petition.

24          <sup>8</sup> As discussed below, petitioner did not raise, and the state courts did not consider, the  
25         claim that counsel rendered ineffective assistance by failing to attend court hearings and failing  
26         to correctly inform him of the proceedings as ordered by the court during one of the hearings. In  
               support of his due process claim for denial of his so-called "Marsden" request, petitioner did  
               claim that counsel failed to appear on July 20 and July 21, 2000. See, e.g., Answer, Ex. G at 6.  
               As noted, petitioner's "Marsden" claim is not before this court.

he deliberately chose not to take the offer because he believed he was innocent and would be found innocent at trial. The case involved a stop of petitioner while driving a vehicle, of which he was the sole occupant; his defense was that the drugs found belonged to another person, Hernandez, and not to him. At the judgment and sentencing hearing, Judge Shepard affirmatively stated that petitioner had a witness, Hernandez, who petitioner wanted the jury to hear, and that the jury simply chose not to believe the witness. This implies that petitioner believed he had a valid defense that would be believed, and wanted to go to trial rather than take the deal for 32 months because he thought he would be acquitted. Petitioner does not present sufficient evidence to show otherwise, other than a bare conclusory statement in this petition made after trial, conviction, and sentence.

To make a claim under Alvernaz,<sup>9</sup> a defendant must show that: (1) counsel was ineffective in advising the defendant at the pretrial stage regarding a proffered plea bargain, (2) there is a reasonable probability that, but for the deficiency, the defendant would have accepted the proffered plea bargain, and (3) the plea bargain would have been approved by the trial court.

Since petitioner was steadfast in his claim of innocence even at the time of judgment and sentencing, and had his witness appear[ed] at trial to claim that the drugs belonged to the witness and not to petitioner, which the jury ended up not believing, it is clear that petitioner would have rejected the plea bargain even if his counsel had not advised him of his maximum exposure if he went to trial and were convicted at the time of the purported plea offer. As such, petitioner's claim fails under Alvernaz and is denied.

Petitioner also claims that his second counsel, Joseph Cress, also failed to advise him to accept a plea offer over going to trial. He claims that counsel was unaware of a 5-year plea offer made by the district attorney at the time of jury selection.

The reporter's transcript for the judgment and sentencing hearing held on September 21, 2000 before Judge Shepard does contain a reference by the district attorney to an offer for five years that was made at the time of jury selection, and a comment by Joseph Cress that he did not recall any such offer being made.

For the reasons stated above, this claim fails as well under Alvernaz, as petitioner wanted to go to trial and be acquitted after presenting his witness's testimony. The claim is denied.

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<sup>9</sup> In re Alvernaz, 2 Cal.4th 924 (1992).

Petitioner also claims that counsel was ineffective in failing to advise petitioner of an in chambers meeting in which the judge ruled that the district attorney could question a defense witness to show that petitioner had greater consequences to lose.

Petitioner states nothing further with regard to this claim, nor does he attach any reasonably available documentary evidence that would reveal any further detail of or give support to this claim. Petitioner does attach one page of a trial transcript showing that a mistrial motion was made regarding a statement about consequences, but nothing further can be discerned from it. As such, petitioner fails to state with particularity the facts upon which he is relying to justify relief (In re Swain (1949) 34 Cal. 2d 300), supported by reasonably available documentary evidence or affidavits (In re Harris (1993) 5 Cal.4th 813. 827 fn.5), and fails to state a *prima facie* case for relief (In re Bower (1985) 38 Cal.3d 865).

Answer, Ex. H at 1-3.

a. Failure to Attend Court Hearings and Explain Proceedings

Petitioner contends that counsel rendered ineffective assistance by failing to attend certain court hearings and failing to explain the proceedings to petitioner as ordered by the court during one of those hearings. This instance of alleged ineffective assistance was not considered in the state courts. Thus, petitioner has failed to exhaust state remedies. Pappageorge, 688 F.2d at 1294. As noted above, pursuant to Cassett, supra, the court may nonetheless address petitioner's claims "when it is perfectly clear that the petitioner has no chance of obtaining relief." Cassett, 406 F.3d at 624. After considering the petition and its exhibits, the answer, reply and state court record, the court finds the Cassett standard has been satisfied, here as well, and thus addresses this claim.

It is unclear from the petition which hearings petitioner contends counsel failed to attend, or at which hearing counsel was ordered to explain the proceedings to petitioner. As noted above, the minute orders do reflect an appearance by another public defender on behalf of Mr. Cress on May 24, 2000. CT 2. This does not constitute a failure to appear by counsel. In addition, in his state court petitions, in support of his claim that the trial court erred in denying his request that Cress be removed so petitioner could represent himself (incorrectly identified by

1 petitioner as a “Marsden” request), petitioner also contends that counsel failed to appear for  
2 hearings on July 20 and July 21, 2000. Answer, Exs. G at 6, I at 6 & K at 6. The court’s minute  
3 orders reflect continuances of trial-setting conferences scheduled for those dates, but make no  
4 reference to counsel’s appearance or nonappearance. Petition, Ex. A; CT 3. Thus, petitioner has  
5 failed to establish that counsel failed to appear at any hearings. Further, petitioner fails to  
6 provide any factual showing to support his conclusory allegation that “counsel failed to perform  
7 his dutys [sic] correctly” in explaining the proceedings to him as ordered by the court at one of  
8 the hearings counsel allegedly did not attend, and relief should be denied on that basis. See Jones  
9 v. Gomez, 66 F.3d 199, 204 (9th Cir. 1995) (“[c]onclusory allegations which are not supported  
10 by a statement of specific facts do not warrant habeas relief” (quoting James v. Borg, 24 F.3d  
11 20, 26 (9th Cir. 1994)).

12 In addition, petitioner fails to show that considering all the circumstances,  
13 counsel’s alleged conduct fell below an objective standard of reasonableness. Strickland, 466  
14 U.S. at 687-88. The record reflects that Mr. Cress was in trial during the periods in question.  
15 See Petition, Ex. A; CT 1-4; ART at 3-5. Whether or not Mr. Cress (or someone else) appeared,  
16 there is no indication that anything other than a continuance occurred at any of these hearings.  
17 CT at 3. Under the circumstances, counsel’s alleged actions (or inactions) do not fall outside the  
18 wide range of professionally competent assistance. Strickland, 466 U.S. at 690.

19 Moreover, petitioner has failed to show that had counsel appeared at the hearings  
20 and explained the proceedings as ordered by the court, the result of the proceedings would have  
21 been different. Id. at 694. Accordingly, petitioner has failed to meet his burden of establishing  
22 that he was prejudiced by counsel’s allegedly defective performance. For all of the above  
23 reasons, petitioner is not entitled to habeas relief on this claim.

24 b. Failure to Advise of Unreported Chambers Meeting

25 Petitioner also claims that counsel was ineffective in failing to inform him of an  
26 unreported meeting in chambers just prior to trial, during which the judge ruled that the district

1 attorney could cross-examine Mr. Hernandez regarding the fact that petitioner faced greater  
2 consequences from conviction than Hernandez would. The superior court rejected this claim,  
3 finding petitioner failed to state with particularity the facts upon which he was relying and to  
4 support them with reasonably available documentary evidence, again citing Swain and Harris.  
5 The superior court also found that petitioner failed to state a case for prima facie relief under In  
6 re Bower, 38 Cal.3d 865 (1985). As previously noted, the superior court's citation to Swain and  
7 Harris indicates a failure to exhaust state court remedies. However, this court finds under Cassett  
8 that it is perfectly clear that petitioner has no chance of obtaining relief on this issue.  
9 Accordingly, the claim is addressed below.

10 In support of this claim, petitioner attaches as Exhibit B to his petition an excerpt  
11 from the reporter's transcript, which contains a reference by Mr. Cress to a meeting in chambers  
12 during which counsel had agreed to the form of the question to be posed to Hernandez by the  
13 district attorney. During the trial, Mr. Cress objected to the prosecutor's questioning of Mr.  
14 Hernandez and moved for a mistrial, which was denied.<sup>10</sup> Reporter's Transcript (RT) 177-180.  
15 Petitioner contends that counsel failed to inform him of the pre-trial meeting in chambers (and  
16 presumably of the court's ruling during that meeting concerning the district attorney's  
17 questioning of Hernandez) and that this constituted ineffective assistance of counsel. However,  
18 petitioner fails to show how this conduct fell below an objective standard of reasonableness, or  
19 how he was prejudiced. He does not explain how his possessing this information would have  
20 altered the result in any way. Petitioner's allegations with respect to this claim are vague and  
21 conclusory and relief should be denied as a result. Jones, 66 F.3d at 204.

22 c. Failure to Advise of Plea Offers

23 Petitioner also contends that counsel was ineffective in failing to advise him of all  
24 plea offers. The superior court denied this claim, citing In re Alvernaz, 2 Cal. 4th 924 (1992),

25  
26 <sup>10</sup> This dispute is also the basis of petitioner's claim of prosecutorial misconduct  
presented in his state court appeals and in his petition to this court, discussed below.

1 which, as noted above, provides that to prevail on such a claim, the defendant must show that  
2 counsel was ineffective in advising the defendant at the pretrial stage regarding a proffered plea  
3 bargain and that there is a reasonable probability that, but for the deficiency, the defendant would  
4 have accepted the proffered plea bargain. Alvernaz, 2 Cal. 4th at 936-38. The Ninth Circuit has  
5 held that Alvernaz “sets forth the same requirements as Strickland in demonstrating an  
6 ineffective assistance claim in the context of plea bargaining” and that therefore, a state court  
7 ruling following Alvernaz is not “contrary to” clearly established Supreme Court law. Nunes v.  
8 Mueller, 350 F.3d 1045, 1053 (9th Cir. 2003).

9           An attorney’s failure to communicate the government’s plea offer to his client  
10 constitutes unreasonable conduct under prevailing professional standards and such a claim, if  
11 proven, would meet the first part of the Strickland test. United States v. Blaylock 20 F.3d 1458,  
12 1465-66 (9th Cir. 1994). Petitioner identifies two plea offers by the district attorney: a 32-month  
13 offer made and rejected during the very early stages of the proceedings (and apparently before  
14 Mr. Cress appeared), and a five-year offer made just prior to jury selection. Petition, Attachment  
15 (“Ground 2”) & Ex. B. Petitioner’s statements at the sentencing hearing show he knew about the  
16 32-month offer. See RT 296-297 (Petitioner’s statements that he would have taken the 32-month  
17 offer if he had known of the drugs in the vehicle). Thus, petitioner’s allegation that he was not  
18 advised of this offer is contrary to the evidence.

19           At the sentencing hearing Mr. Cress stated he did not recall the five-year offer.  
20 Petition, Ex. B; RT 294. The district attorney stated that she had made the offer just prior to jury  
21 selection and it had been rejected. Petition, Ex. B; RT 293. Petitioner claims not to have known  
22 of this offer. The record is unclear whether Mr. Cress or another public defender rejected the  
23 offer on petitioner’s behalf. In either event, failing to communicate the offer or rejecting it  
24 without informing petitioner could rise to the level of ineffective assistance of counsel if  
25 petitioner was able to prove prejudice. See Jones v. Wood, 114 F.3d 1002, 1012 (9th Cir. 1997).  
26 “In order to prove prejudice where counsel fails to inform the petitioner about a plea offer, the

1 petitioner must prove there was a reasonable probability he would have accepted the offer.” Id.  
2 at 1012 (citing Blaylock at 1466-67). In this case, although petitioner states “there would have  
3 been a different outcome of proceedings,” Petition, Attachment (“Ground 2”), he does not  
4 specifically allege that he would have accepted either offer. Even if his petition could be  
5 interpreted to allege this, such an allegation is contrary to the evidence. It is clear from the  
6 record that petitioner believed he had a valid defense and wanted to go to trial and present his  
7 witness, Mr. Hernandez. He stated unequivocally at the sentencing hearing that he would have  
8 taken the 32-month offer only if he had been guilty, i.e., if he had had knowledge of the drugs in  
9 the vehicle. RT 296-297. It is evident he would not have accepted the longer five-year plea for  
10 the same reason. Thus, the superior court correctly found that petitioner did not prove there was  
11 a reasonable probability he would have accepted a plea offer. The state court’s denial of this  
12 claim was therefore neither an unreasonable determination of the facts nor an unreasonable  
13 application of clearly established federal law.

14                  d. Failure to Advise Petitioner to Accept a Plea

15                  Petitioner claims that counsel was ineffective because Mr. Cress did not advise  
16 him that taking a plea rather than going to trial would be a prudent choice. In retrospect, such an  
17 assessment would appear to have been correct, because petitioner ultimately received a sentence  
18 of thirteen years, over twice the five years offered by the district attorney just prior to trial.  
19 Citing Alvernaz the superior court found this claim failed because petitioner wanted to go to trial  
20 and be acquitted after presenting his witness’s testimony. As discussed above, this ruling is not  
21 “contrary to” clearly established federal law. Nunes, 350 F.3d at 1053.

22                  Counsel is required to ensure that a client understands the terms of a plea offer  
23 and its significance. See United States v. Rivera-Sanchez, 222 F.3d 1057, 1060-61 (9th Cir.  
24 2000). Failing to advise a client to enter a plea bargain when it is clearly in the client’s best  
25 interest to do so is ineffective assistance of counsel. United States v. Leonti, 326 F. 3d 1111,  
26 1117 (9th Cir. 2003); Boria v. Keane, 99 F.3d 492, 497 (2d Cir. 1996). The Strickland analysis

1 applies to claims of ineffective assistance of counsel involving counsel's advice offered during  
2 the plea bargain process. See Hill v. Lockhart, 474 U.S. 52, 58 (1985). Whether an attorney's  
3 advice constituted ineffective assistance of counsel must be determined on the basis of the  
4 situation as the attorney saw it when he gave the advice and not on the basis of a hindsight  
5 analysis of the correctness of that advice. Strickland, 466 U.S. at 689 ("A fair assessment of  
6 attorney performance requires that every effort be made to eliminate the distorting effects of  
7 hindsight and to evaluate the conduct from counsel's perspective at the time."). In order to  
8 prevail on this claim, petitioner must demonstrate "gross error on the part of counsel." McMann  
9 v. Richardson, 397 U.S. 759, 772 (1970).

10           Although in hindsight counsel would have been wise to advise the petitioner to  
11 take either plea, the fact that he did not do so cannot be said to be ineffective assistance of  
12 counsel under this court's "highly deferential" "scrutiny of counsel's performance." Strickland,  
13 466 U.S. at 689. It cannot be said that at the time of the plea offers, a plea was clearly in the best  
14 interest of petitioner. Both petitioner and his counsel believed defendant had a meritorious  
15 defense. RT 294-297. Neither knew that the jury would not believe Mr. Hernandez's testimony.  
16 Id. An attorney's advice is not constitutionally defective because the attorney lacks a crystal ball.  
17 See Turner v. Calderon, 281 F. 3d 851, 881 (9th Cir. 2002). Accordingly, petitioner has failed to  
18 show that counsel's performance fell below an objective standard of reasonableness.

19           Furthermore, petitioner has failed to show that he would have been persuaded by  
20 counsel to accept the offer. As noted above, petitioner's remarks at sentencing indicate that he  
21 believed he would prevail at trial and that he would have accepted the 32-month offer only if he  
22 had had knowledge of the drugs in the car. RT 296-297. In fact, petitioner cited his rejection of  
23 the 32-month plea offer as proof of his innocence, stating it was his practice to take the first plea  
24 offer when he was guilty. See RT 296 ("[B]y looking at the probation report, you can judge my  
25 character. Now, my character is, if I was guilty of that, I usually do take the first offer."). It is  
26 improbable that counsel would have been able to convince petitioner to take either offer under

1 the circumstances. Petitioner cannot show that he was prejudiced by counsel's failure to advise  
2 him to accept a plea offer rather than go to trial as required under Jones and Blaylock. Thus, the  
3 state court properly rejected petitioner's claim and denial of the claim was neither an  
4 unreasonable determination of the facts nor an unreasonable application of clearly established  
5 federal law.

6 For the above reasons, petitioner is not entitled to habeas relief on his claim for  
7 ineffective assistance of counsel.

8 C. Instructional Error (Claim 3)

9 Petitioner claims the trial judge erred in deciding to include only a portion of the  
10 bracketed language contained in a California standard form jury instruction, CALJIC 2.02, in his  
11 instructions to the jury. The unmodified form of CALJIC 2.02 is as follows:

12 The [specific intent] [or] [and] [mental state] with which an act is  
13 done may be shown by the circumstances surrounding the  
14 commission of the act. However, you may not [find the defendant  
15 guilty of the crime charged [in Count [s] \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, and  
16 \_\_\_\_\_], [or] [the crime[s] of \_\_\_\_\_, \_\_\_\_\_,  
17 \_\_\_\_\_, which [is a] [are] lesser [crime[s],] [or] [find the  
allegation \_\_\_\_\_ to be true,] unless the proved  
circumstances are not only (1) consistent with the theory that the  
defendant had the required [specific intent] [or] [and] [mental  
state] but (2) cannot be reconciled with any other rational  
conclusion.

18 Also, if the evidence as to [any] [specific intent] [or] [mental state]  
19 permits two reasonable interpretations, one of which points to the  
20 existence of the [specific intent] [or] [mental state] and the other to  
21 its absence, you must adopt that interpretation which points to its  
22 absence. If, on the other hand, one interpretation of the evidence as  
to the [specific intent] [or] [mental state] appears to you to be  
reasonable and the other interpretation to be unreasonable, you  
must accept the reasonable interpretation and reject the  
unreasonable.

23 Answer, Ex. D (Decision of Court of Appeal) at 6-7.

24 ////

25 ////

26 ////

1 At trial, petitioner's counsel requested that the court include both of the key terms  
2 in brackets (i.e., "specific intent" and "mental state") as to both Counts One and Two, arguing  
3 that this was necessary because elements of both of the offenses, and the lesser included offense  
4 of simple possession, include the mental state of knowledge:

5 Well, with respect to 2.02, again, it is still my provision *[sic]* that  
6 the language regarding mental state should be kept in there with  
respect to knowledge, which appears to be a requirement in both  
the charged offenses and lesser offense.

7 \* \* \*

8 I'm making the same request here, in that the charged offenses do  
9 have a mens rea of knowledge, and I would ask that that be  
10 included in 2.02. I think the first paragraph of 2.02 would also  
need to state specific intent and mental state.

11 RT 182-183.

12 The trial court denied the request, noting that knowledge of the presence of the  
13 controlled substance and knowledge of its nature as a controlled substance are both elements of  
14 the charged offenses, and opining that the court was not required to give an instruction on mental  
15 state with respect to CALJIC 2.02. RT 183-184. As a result, CALJIC No. 2.02, as given, was  
16 limited to "specific intent," which related only to Count One for possession for sale. The  
17 instruction read to the jury was as follows:

18 The specific intent with which an act is done may be shown by the  
19 circumstances surrounding the commission of the act. However,  
you may not find the defendant guilty of the crime charged in  
Count One, possession of methamphetamine for the purposes of  
sale, unless the proved circumstances are not only, one, consistent  
with the theory that the defendant had the required specific intent  
but, two, cannot be reconciled with any other rational conclusion.

22 Also, if the evidence as to the specific intent permits two  
23 reasonable interpretations, one of which points to the existence of  
the specific intent and the other to its absence, you must adopt that  
interpretation which points to its absence.

24 ////

25 ////

26 ////

If, on the other hand, one interpretation of evidence as to the specific intent appears to you to be reasonable and the other to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

RT 192-193.

Petitioner contends that, as a result of the court's decision to eliminate the language concerning the mental state of knowledge from CALJIC 2.02, the jury was not properly instructed on the sufficiency of circumstantial evidence to prove the mental state of knowledge with respect to either count. Petitioner alleges that because the claimed lack of knowledge was the essence of his defense, this error constituted a denial of due process under the federal constitution, in that the jury was not properly instructed on the defendant's theory of the case. Petition, Attachment ("Ground 3").

This claim was presented to the California Court of Appeal on direct appeal and to the California Supreme Court on a petition for review, and was denied by both. In rejecting petitioner's claim, the Court of Appeal found:

The trial court instructed the jury on the elements of the offenses, possession of methamphetamine for sale (CALJIC No. 12.01) and transportation of methamphetamine (CALJIC No. 12.02). Elements of both offenses include that defendant knew of the presence of the methamphetamine and of the nature of the substance as a controlled substance. The trial court instructed the jury on direct and circumstantial evidence ( CALJIC No. 2.00) and that a crime may be proven by circumstantial evidence ( CALJIC No. 2.01).

The jury was also instructed to consider the instructions as a whole (CALJIC No. 1.01). Based on the instructions given, the jury was properly instructed on the use of circumstantial evidence to prove the crimes, including the element of knowledge. The jury was instructed that it must find that defendant knew of the presence and nature of the controlled substance and that circumstantial evidence could be used to prove the same but to reject unreasonable interpretations of the evidence and to give defendant the benefit of reasonable doubt. Any defect in CALJIC No. 2.02 was cured by the other instructions given.

Answer, Ex. D at 9-12 (footnotes omitted).

A criminal defendant is entitled to adequate instructions on the defense theory of the case. Conde v. Henry, 198 F.3d 734, 739 (9th Cir. 2000). A refusal adequately to instruct may deprive a defendant of due process. Id. at 741. However, “the exact language proposed by the defendant need not be used, and it is not error to refuse a proposed instruction so long as the other instructions in their entirety cover that theory.” United States v. Kenny, 645 F.2d 1323, 1337 (9th Cir. 1981); United States v. Del Muro, 87 F.3d 1078, 1081 (9th Cir. 1996). An examination of the record is required to see precisely what instructions were given and what was refused, and whether the given instructions embodied the defendant’s theory. See United States v. Tisinnijinnie, 601 F.2d 1035, 1040 (9th Cir. 1979).

An examination of the record demonstrates that the instructions in their entirety adequately covered the defense theory of the case as identified by petitioner, specifically, that petitioner lacked the requisite knowledge. As the Court of Appeal correctly observed, the trial court instructed the jury using CALJIC Nos. 12.01 and 12.02, which define the charges of possession for methamphetamine for sale and transportation of methamphetamine, respectively, and set forth the elements to be proven as to each charge. RT 198-200; CT 63-64. Both of these instructions state that elements of the offense include that defendant knew of the presence of methamphetamine and its nature as a controlled substance. Id. The jury was further instructed on direct and circumstantial evidence (CALJIC 2.00) and that a crime may be proven by circumstantial evidence (CALJIC 2.01). RT 189-191; CT 58-59. Included in CALJIC 2.01 is the following language: “[i]f the circumstantial evidence as to any particular count permits two reasonable interpretations, one of which points to the defendant’s guilt and the other to his innocence, you must adopt that interpretation that points to the defendant’s innocence and reject that interpretation that points to his guilt.” RT 191. Finally, the jury was instructed to consider the instructions as a whole (CALJIC 1.01). RT 187; CT 57. Thus, the jury was instructed that to convict petitioner of either charge, it had to find that petitioner knew of the presence of the methamphetamine and its nature as a controlled substance; that circumstantial evidence could be

1 used to prove this; that if the circumstantial evidence was susceptible to two conflicting  
2 interpretations jurors should draw all inferences in favor of the defendant; and that they must  
3 consider the instructions as a whole. Taken collectively, the instructions sufficiently embodied  
4 the defense theory of the case such that there was no due process violation in this regard.

5 A jury instruction also violates due process if it fails to give effect to the  
6 requirement that the state prove every element of the offense. Sandstrom v. Montana, 442 U.S.  
7 510, 520-21 (1979). “Nonetheless, not every ambiguity, inconsistency, or deficiency in a jury  
8 instruction rises to the level of a due process violation.” Middleton v. McNeil, 541 U.S. 433, 437  
9 (2004). Rather, the question is whether the “ailing instruction by itself so infected the entire trial  
10 that the resulting conviction violates due process.” Estelle v. McGuire, 502 U.S. 62, 72 (1991).  
11 In making this determination, a single instruction “may not be judged in artificial isolation, but  
12 must be viewed in the context of the overall charge.” Boyd v. California, 494 U.S. 370, 378  
13 (1990). As noted above, although the trial court refused to give the instruction as requested by  
14 petitioner, the jury was nonetheless properly instructed on all of the elements of the offenses to  
15 be proven by the state. Thus, there was no deficiency. Even assuming such a deficiency,  
16 petitioner has failed to show that it “so infected the entire trial that the resulting conviction  
17 violates due process.” Estelle, 502 U.S. at 72.

18 Based upon the foregoing, the state court’s rejection of petitioner’s claim was not  
19 contrary to nor an unreasonable application of clearly established United States Supreme Court  
20 precedent and petitioner is not entitled to habeas relief on his claim of instructional error.

21 D. Prosecutorial Misconduct (Claim 4)

22 The standard of review for prosecutorial misconduct in federal habeas cases is  
23 “the narrow one of due process, and not the broad exercise of supervisory power.” Donnelly v.  
24 DeChristoforo, 416 U.S. 637, 642 (1974). To prevail on a claim for prosecutorial misconduct,  
25 petitioner must show that the conduct “so infected the trial with unfairness as to make the  
26 resulting conviction a denial of due process.” Darden v. Wainwright, 477 U.S. 168, 181 (1986).

1 "To constitute a due process violation, the prosecutorial misconduct must be 'of sufficient  
2 significance to result in the denial of the defendant's rights to a fair trial.'" Greer v. Miller, 483  
3 U.S. 756 (1987) (quoting United States v. Bagley, 473 U.S. 667, 676 (1985)). Moreover, even if  
4 an error of constitutional magnitude is determined, it will be held harmless unless petitioner can  
5 show that it "had a substantial and injurious effect or influence in determining the jury's verdict"  
6 or that it involved "a deliberate and especially egregious error" or "combined with a pattern of  
7 prosecutorial misconduct, might so infect the integrity of the proceeding" as to warrant habeas  
8 relief. Brecht v. Abrahamson, 507 U.S. 619, 637, 638 n.9 (1993) (quoting Kotteakos v. United  
9 States, 328 U.S. 750, 776 (1946)).

10 Petitioner contends that the trial court should have granted his motion for a  
11 mistrial based on prosecutorial misconduct. Specifically, petitioner claims that the prosecutor  
12 violated a prior in-chambers stipulation and ruling by inserting the word "much" on two  
13 occasions into a question directed to witness Hernandez on cross-examination. This claim was  
14 presented to the California Court of Appeal on direct appeal and to the California Supreme Court  
15 on petition for review, and was denied by both on the merits. The Court of Appeal gave the  
16 following description of the events in the trial court:

17 On cross-examination, the prosecutor asked Hernandez:

18 "Now, you know that the consequences for conviction for charges  
19 in this case, namely possession of methamphetamine for sale, are  
*much* greater for the defendant than they are for you, correct?"  
20 Hernandez answered affirmatively. (Emphasis added.) Defense  
counsel objected: "I would object to that question." The court  
overruled the objection. The prosecutor followed up:

21 "[The prosecutor]: Is that 'yes'?

22 "[Hernandez]: No. Excuse me? Repeat yourself again?

23 "Q. [ ] You know that the consequences for a conviction of being  
24 in possession of methamphetamine for the purposes of sale are  
*much* greater for the defendant than for you?

25 "A. I – Doesn't make a difference, does it?

1 "Q. You know that the consequences are greater for him than for  
2 you, correct?

3 "A. What do you mean by that? 'Greater'?

4 "[The prosecutor]: May we approach?

5 "THE COURT: No. I don't think there's any need to.

6 "Q. [The prosecutor]: You don't know what I mean by the  
7 consequences being greater for him than they are for you?

8 "A. You mean – I don't understand what you're trying to say here.

9 "Q. Well, initially you said 'yes'. What did you think that you were  
10 answering then?

11 "A. You mean he's going to go to jail for it? Is that what you mean?

12 "Q. Well, you know the consequences-

13 "A. They're both going to go to jail.

14 "Q. – For you, correct?

15 "A. Yes.

16 "Q. But you're telling the jury that that has no influence on your  
17 coming in here and claiming responsibility?

18 "A. I'm just taking the responsibility for it.

19 "Q. And you're saying that for him, the person that you consider to  
20 be like a brother, for you, being greater than for you, has no  
21 bearing on your coming in here and testifying today?

22 "A. I don't understand that.

23 "Q. Knowing that the consequences are greater if the defendant is  
24 convicted than if you are for this crime- -

25 "A. Yes.

26 "Q. – Knowing that, are you telling the jury that that has no  
influence on you at all to make you come in here and testify?

"A. No.

"Q. No, it doesn't, or, no, you're not telling the jury that?

////

1 "A. I guess I understand – I'm telling the jury – [¶] Are you saying  
2 that he's going to get more time for it? For the drugs, you mean?  
[¶] I don't understand what you are saying.

3 "Q. Well, I'm saying that the consequences for him are greater. If  
4 the two of you are convicted, the consequences are greater for him  
than for you?

5 "A. I understand that, yes.

6 "Q. And you're telling me that that means nothing to you; that has  
7 no influence on you at all coming in here and testifying? That has  
not influenced you at all?

8 "A. No.

9 "Q. It's simply that you want to come in here and take the  
10 responsibility for it?

11 "A. Yes." (Emphasis added.)

12 Upon completion of Hernandez's testimony, the court excused the  
13 jury. Thereafter, defense counsel moved for a mistrial arguing that  
the prosecutor's question which was asked "three times"  
14 significantly differed from that agreed to in chambers. Defense  
counsel noted that defendant had more of a criminal history than  
Hernandez who had one arrest and no convictions. The prosecutor  
explained that she had to ask the question several times because  
15 Hernandez claimed he did not understand the meaning of  
consequences. Defense counsel complained that the prosecutor  
16 used the word "'penalty.'" The prosecutor retorted that Hernandez  
brought up the word jail and sentencing and claimed that she  
17 complied with the agreement to use the word consequences.  
Defense counsel stated the prosecutor stated the "consequences are  
18 much greater" which was "[i]n clear violation of what we had  
agreed upon." After clarifying that defense counsel was objecting  
19 to the prosecutor's use of the word "much," the court stated: "I'll  
give her that change-The change of any of what we discussed. The  
20 witness didn't understand 'consequences', so she used the word  
'penalties', the penalties are greater than they would be for him. [¶]  
21 He still didn't seem to understand it, so after repeating it three or  
four times, he seemed to understand what she was getting at. I don't  
22 see any error and improper conduct here. [¶] The bottom line was,  
it was a motive for him testifying; that's what we were trying to get  
23 at. And I think it was covered properly, so I am going to deny the  
motion for mistrial."

24  
25 Answer, Ex. D (Court of Appeal Decision) at 13-16.

26 ////

1 As the Court of Appeal observed, the prosecutor's questioning does appear,  
2 strictly speaking, to have violated the stipulation:

3 Initially, we note that the in-chambers stipulation was not on the  
4 record. In discussing the mistrial motion, however, there seemed to  
5 be no disagreement that the prosecutor's question to Hernandez  
6 was to be limited to whether defendant would suffer greater, not  
*much* greater, consequences than Hernandez if convicted of  
7 possession of methamphetamine for sale and transportation of the  
8 same. Thus, in cross-examining Hernandez, the prosecutor appears  
9 to have violated the stipulation.

10 Id., Ex. D at 19 (emphasis in original). However, the Court of Appeal found the error did not  
11 deny petitioner a right to a fair trial or due process, and that, in any event, any error was  
12 harmless:

13 [T]he prosecutor's two questions where she added the word "much"  
14 before consequences, did not demonstrate an egregious pattern of  
15 misconduct to warrant a conclusion that the trial had been infected  
16 with unfairness as to violate defendant's right to a fair trial or due  
17 process. The trial court stated it would give her that change.

18 In any event, any error was harmless. Defendant successfully  
19 bifurcated his priors. Defendant did not testify so the jury did not  
20 learn of his priors, evidence of which presumably would have been  
21 adduced on cross-examination. In questioning Hernandez about the  
22 consequences he would suffer as compared to defendant, the word  
23 "greater" itself, even without the word "much" before it, clearly  
24 conveyed to the jury that defendant would suffer more. From the  
fact that Hernandez had only one arrest and no convictions and that  
defendant would suffer much greater consequences, defendant  
claims the jury would infer that defendant had prior convictions.  
The prosecutor's question alone, to which defendant objected,  
would not necessarily convey that information to the jury. When  
read in context, perhaps the jury inferred that but that was due to  
defendant's witness who expressed a misunderstanding of the word  
consequences and blurted out, "You mean he's going to go to jail  
for it" and "Are you saying that he's going to get more time for it?"

25 Moreover, based on the overwhelming evidence of defendant's  
26 guilt and Hernandez's unbelievable testimony, defendant suffered  
no prejudice from the use of the prosecutor's use of the word  
"much."

27 Id., Ex. D at 19-20.

28 ////

1 Petitioner contends that the prosecutor's use of the word "much" constituted  
2 prosecutorial misconduct because it improperly placed extrajudicial information before the jury,  
3 namely, petitioner's prior criminal record, in violation of petitioner's constitutional right of  
4 confrontation. Petition, Attachment ("Ground 4"). However, as noted by the Court of Appeal, it  
5 is not at all evident from the record that the jury would have necessarily made any inferences  
6 concerning petitioner's prior record, either from the prosecutor's questioning alone or in the  
7 context of the entire trial. Giving petitioner the benefit of the doubt and assuming that the jury  
8 would have "logically inferred that Crespo had suffered prior convictions," it seems no more  
9 likely that the jury would have drawn this inference from the words "much greater" than from the  
10 word "greater." Accordingly, the prosecutor's conduct does not appear to have "so infected the  
11 trial with unfairness as to make the resulting conviction a denial of due process." Darden, 477  
12 U.S. at 181. The Court of Appeal thus properly held that the petitioner had not been denied due  
13 process or a fair trial as a result of the prosecutor's conduct.

14 The Court of Appeal also properly held that any error was harmless. The  
15 prosecutor's addition of the word "much" on two occasions did not amount to a "deliberate and  
16 especially egregious error." Brecht, 507 U.S. at 638 n.9. It appears from the record to have been  
17 inadvertent, resulting from Hernandez's evasive responses, which made it necessary for the  
18 prosecutor to repeat the question several times and to make various attempts to rephrase it when  
19 he stated he did not understand what she meant by various terms. Nor was this error  
20 accompanied by a "pattern of prosecutorial misconduct." Id. Petitioner cites no other instances.  
21 Finally, petitioner has failed to show that the verbal misstep "had a substantial and injurious  
22 effect or influence on determining the jury's verdict." Id. at 637. It is apparent that even if the  
23 prosecutor had phrased the question as stipulated on the two occasions where she added the word  
24 "much," the jury would have nonetheless found Hernandez's testimony unbelievable.

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Based upon the foregoing, the state court's rejection of petitioner's claim was not contrary to nor an unreasonable application of clearly established United States Supreme Court precedent, and petitioner is not entitled to habeas relief on his claim of prosecutorial misconduct.

Accordingly, IT IS HEREBY RECOMMENDED that petitioner's application for a writ of habeas corpus be denied.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: February 15, 2007.

  
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U.S. MAGISTRATE JUDGE

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